OPINION
76-107

January 29, 1976 (OPINION)

The Honorable J. O. Wigen
Commissioner of Insurance
State Capitol
Bismarck, ND 58505

Dear Commissioner Wigen:

This is in response to your request for an opinion whether or not the Josten's "School Ring Extended Service Agreement" constitutes insurance, making that agreement and Josten's subject to the insurance laws of North Dakota. We have reviewed the agreement enclosed with your letter and find that the agreement provides that for a fee of $15.00 Josten's will replace a class ring on conditions of accidental loss, loss from fire, loss by theft, burglary, or larceny and in the event the ring is severely damaged (through no negligence on purchaser's part) and the ring is returned to the company at the time a claim is submitted.

The determination of this question evolves around the interpretation given to one provision of the North Dakota Century Code. Section 26-02-01 defines a "contract of insurance" and reads:

> "26-02-01. "CONTRACT OF INSURANCE" DEFINED. Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event."

In attempting to interpret this provision, we receive no assistance from the North Dakota Supreme Court as it has never had the opportunity to consider the above quoted provision, nor has it dealt with the general question: What constitutes insurance? However, there is no dearth of authority from other jurisdictions (see "What Constitutes Insurance?", 63 A.L.R. 711, 100 A.L.R. 1449, 119 A.L.R. 1241.).

The authorities appear to establish no clear cut consensus as to how the determination is made whether a particular agreement is a contract of insurance or some agreement other than insurance. The only consensus appears to be that the facts and circumstances of each case must be examined in light of the statutory provision, or provisions, under consideration.

Unquestionably, Section 26-02-01 of the North Dakota Century Code is broad and general. We do not believe the legislature intended that every contract which has an element of risk of loss should be classified as a contract of insurance. By merely arbitrarily applying Section 26-02-01, almost all contracts could be classified as "contracts of insurance". This is surely not the intent of the legislature.

We are not unimpressed by the statement made by Professor Keeton, in

Keeton, Insurance Law - Basic Text, 8.2(a), in a footnote at page 543 where he discusses the Massachusetts and California statutory definitions of insurance which at the time of his writing were identical to Section 26-02-01 of the North Dakota Century Code where he notes:

> "Arguably these statutes should be read not as stating that every transaction having the stated characteristics is insurance but only as saying that no transaction is insurance unless it has these characteristics. If so construed, there would seldom be any occasion to invoke them since it is not likely that a transaction lacking these characteristics would be alleged to be insurance even if there were no statutory definition of that term. Reading these statutes instead as stating that all transactions having these characteristics are insurance would be to give them a meaning plainly inconsistent with a much narrower scope of regulation in practice. Many arrangements having these characteristics are never asserted to be insurance even by the most aggressive of regulatory officials."

It becomes patently clear that more than just the definition of a "contract of insurance" must be considered.

A number of authorities have applied the test of whether the principle purpose of the plan, when viewed in its entirety, is service or indemnity. See Guaranteed Warranty Corp., Inc v. Humphrey, 533 P. 2d. 87 (App.Ct. Ariz. 1975); Transportation Guarantee Company v. Jellins, 29 Cal. 2d. 242, 174 P. 2d. 625 (1946); 119 A.L.R. 1241; 43 Am. Jur.2d. Insurance, Section 7 (1969); 12 Appleman, Insurance Law and Practice, Section 7002. In applying this test the appellate court in Arizona in Guarantee Warranty Corp., Inc. v. Humphrey, supra at page 90, used the following criteria to assist it:

> "Five elements are normally present in an insurance contract, which include:
>
> 1. An insurable interest
>
> 2. A risk of loss
>
> 3. An assumption of risk by the insurer
>
> 4. A general scheme to distribute the loss among the larger group of persons bearing similar risks
>
> 5. The payment of premium for the assumption of risk"

Neither do we feel that the criteria set forth in the courts opinion is all inclusive, nor that all of the elements must be fulfilled in order for an agreement to be considered insurance. It is merely a guide to determine whether the principle purpose of the plan, when viewed in its entirety is one of service or indemnity.

Turning to the Josten's agreement, that agreement has all of the elements of an insurance contract set forth above. The graduate, or

potential graduate, has an insurable interest in the class ring purchased, and there is a risk of loss. For a fee of $15.00 Josten's agrees to replace the ring when the loss results from accidental loss, loss from fire, loss by theft, burglary or larceny, and to replace the class ring when severely damaged so long as there is no negligence on the part of the individual who purchased the ring. In addition, there appears to be a general scheme to distribute the delineated losses among the larger group of ring purchasers who bear the same or similar risks.

Further, we cannot ignore the analogy between Josten's agreement and the agreement considered by the court in the case of Ollendorf Watch Company v. Pink, 279 N.Y. 32, 17 N.E.2d. 676 (1938). The Ollendorf Watch Company issued with each watch it sold a certificate in which it agreed to replace such watch with a new watch of like quality provided the first should be lost, within a year of purchase, through burglary or robbery. The company charged no fee for this service and it paid from its own funds the premium on a burglary and theft policy issued by an insurance company. The court held the Ollendorf Watch Company to be engaged in the insurance business, and after discussing the distinction between the contract issued by Ollendorf and contracts other than insurance, the court went on to say on page 677:

> "This contract goes much further. It has nothing whatsoever to do with the sale of the watch or the contract of sale. It is an extraneous inducement to procure sales. If the watch is stolen the seller will replace it. In other words, he takes a chance or a risk of theft from his customers; that is, he insures them for a year against such risk."

Likewise, Josten's "School Ring Extended Service Agreement" has really nothing whatsoever to do with the sale of the class ring. It too is nothing more than an inducement to procure sales.

The fact an agreement specifies the replacement of property rather than the payment of a monetary amount does not preclude it from being considered an insurance contract. See Ollendorf Watch Company v. Pink, supra; 12 Appleman, Insurance Law and Practice, Section 7001; 43 Am. Jur.2d, Insurance, Section 7 (1969). 43 Am. Jur.2d., Insurance, Section 7, states it most succinctly:

> "To constitute insurance, the promise need not be one for the payment of money, but may be its equivalent or some act of value to the insured upon the injury or destruction of the specified property; . . ."

Thus, it is clear that the replacement of a ring by Josten's rather than the payment of a monetary amount does not preclude the agreement from being classified as an insurance contract.

Numerous reasons exist to subject the "School Ring Extended Service Agreement" and Josten's to the North Dakota Insurance Laws even though the proceeds generated from the sale of the agreement may be minuscule in relation to Josten's overall sales and only incidental to its business. Not one authority has suggested that an agreement will be subject to regulation as insurance depending upon the amount of revenue such an agreement generates in relation to the entity's

overall revenues. Obviously, such a suggestion is untenable. How does not determine at what point the insurance regulation starts? What are the equities of requiring an insurance company to file policy forms and rates for approval and to pay premium taxes on the business done while excluding an entity from such requirements because the agreement it uses is purely incidental to its overall business? If the agreement is a contract of insurance, it must be regulated as such.

The test to be applied in determining whether an agreement is, or is not, insurance, is not whether the principle purpose of the entity as in the case of Josten's, when viewed in its entirety, is sales or indemnity. The test to be applied is whether the principle purpose of the "School Ring Extended Service Agreement", when viewed in its entirety, is service or indemnity. Noting that the agreement contains the five elements normally present in an insurance contract as outlined in Guaranteed Warranty Corp., Inc. v. Humphrey, supra, it is one of indemnity.

It is the opinion of this office that the "School Ring Extended Service Agreement" is a contract of insurance and that Josten's must comply with the North Dakota Insurance Law in order to use that agreement in this state.

Very truly yours,

ALLEN I. OLSON

Attorney General